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IN THE
Supreme Court of the United States

October Term, 1958

NO. 434

UNIVERSAL TRADES, INC.,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
Appellee

MOTION TO DISMISS OR AFFIRM

EDWARD FRIEDMAN,
Deputy Attorney General
THOMAS D. MCBRIDE,
Attorney General
Counsel for Appellee.

State Capitol,
Harrisburg, Pennsylvania.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.

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COMMONWEALTH OF PENNSYLVANIA
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MOTION TO DISMISS OR AFFIRM

Appellee moves that the present appeal be dismissed or that the final judgment of the Supreme Court of Pennsylvania in the present case be affirmed on the grounds that the Federal question presented is so unsubstantial as not to warrant argument thereon.

STATEMENT

Appellee submits that the question raised by this appeal presents no substantial Federal question for the reason that the issue has been finally determined by a long line of decisions of the Supreme Court of the United States. Accordingly, there is no basis or reason for further argument thereon.

The Commonwealth of Pennsylvania imposes a capital stock tax[1] upon all domicile corporations based upon the valuation of all the corporations' capital stock as represented by its assets situated within the Commonwealth. Tangible assets located outside the Commonwealth are excluded from the base. Intangible assets, regardless of the location of the evidence of their existence, are included in the base. In the instant case the taxpayer owned intangible assets having a net book value of $271,052.92, which were its only assets assignable to Pennsylvania for capital stock tax purposes. The documentary evidence of such intangibles was located outside the State. By the application of an allocation formula, the valuation of the capital stock for Pennsylvania capital stock tax purposes was fixed at $134,090.00. (R. 9a, 10a).

The appellant contends that the rule of mobilia sequuntur personam, as enunciated by the Supreme Courts of Pennsylvania and of the United States,

[1] Act of June 1, 1889, P. L. 420, as amended, 72 P. S. §§ 1871 and 1901.

should be reversed and that its tangible assets, the evidence whereof is located outside of Pennsylvania, should be excluded from the base in valuing the capital stock of the corporation for Pennsylvania capital stock tax purposes.

Documentary evidence representing the existence of some, but not all, of appellant's intangibles is in Florida. The Record does not disclose the value of such intangibles in Florida. Appellant seeks not only to deny Pennsylvania the right to tax the alleged Florida intangibles but all of its intangibles regardless of where the evidence thereof is situate. The location or status of the documentary evidence such other intangibles is neither alleged nor proved.

The Commonwealth of Pennsylvania, appellee, submits that under the law the intangible assets of appellant, a domestic corporation domiciled in Pennsylvania, are situated in Pennsylvania, the domicile of the owner, and that, regardless of whether or not they have acquired a situs outside the State subjecting them to taxation at such situs, they are, nevertheless, present in Pennsylvania and are subject to taxation by the State of domicile. The Commonwealth submits further that, although the existence of a business situs for certain intangibles of the corporation is not material to the present issue, the appellant has not proved sufficient facts to justify the determination of a tax situs for the intangibles in Florida or elsewhere outside of Pennsylvania.

QUESTIONS PRESENTED

1. May intangible assets of a domestic corporation be included in determining the valuation of the corporation's capital stock for capital stock tax purposes when the documentary evidence of the ownership of such intangible assets is located outside the domiciliary state?

2. Does the fact that the documentary evidence of the ownership of the intangible assets of a domestic corporation is in a foreign state where the corporation maintains an office remove such assets from the taxing jurisdiction of the domiciliary state?

SUMMARY OF ARGUMENT

The Supreme Court of the United States has consistently ruled that the law of mobilia sequuntur personam applies to intangibles and that by virtue thereof the state of domicile has the absolute right to impose a property tax upon the intangibles of its residents regardless of the physical situs of such intangibles. Any argument in opposition to this principle contravenes the established law on a subject which has been finally adjudicated by the Supreme Court of the United States and consequently does not present a substantial Federal question.

The existence of a so-called business or tax situs of intangibles outside the domiciliary state of the owner does not deprive the domiciliary state of its right to impose a tax thereon.

Even though intangibles may have acquired such a business situs in a foreign state as to authorize the imposition of a tax thereon by the latter state, the domiciliary state still retains its original and fundamental authority over such intangibles, and they remain in the domiciliary state for the purpose of taxation. The fact that the intangibles may be taxed by the state of domicile and the state of business situs, does not offend, and is consistent with the Due Process Clause of the Federal Constitution.

The instant case does not present any substantial Federal question for the further reason that the rec-

ord does not disclose that appellant's intangibles have acquired a business or tax situs outside of Pennsylvania, the domiciliary state.

Appellant seeks a reversal of the unbroken line of decisions, holding that the situs of intangibles is at the domicile of the owner and empowers the domiciliary state to impose a property tax thereon.

ARGUMENT

1. THE RIGHT OF STATE OF DOMICILE TO TAX—MOBILIA SEQUUNTUR PERSONAM

The law as enunciated by the Supreme Court of the United States has always been, without exception, that the state of domicile has the right to tax intangibles of a domicile corporation, regardless of where the documentary evidence thereof is situated. The various conflicting decisions have to do only with the additional right of the state of physical location, business situs, etc., to impose a tax. So, in *Blackstone v. Miller*, 188 U. S. 189 (1903), it was held that the state of domicile and the state of physical situs may both tax. In *Farmers Loan Company v. Minnesota*, 280 U. S. 204 (1930), overruling the latter case, it was held that only the state of domicile of the owner could impose a tax. To the same effect, see *Baldwin v. Missouri*, 281 U. S. 586 (1930); *Beidler v. South Carolina Tax Commission*, 282 U. S. 1 (1930). These two cases were overruled by *State Tax Commission of Utah v. Aldrich*, 316 U. S. 174 (1942), which held that both the state of domicile and business situs have jurisdiction to tax. Since the *Utah* case decision, the attempt to establish a Fourteenth Amendment prohibition against multiple taxation has been discarded.

The position of the Commonwealth of Pennsylvania is sustained by *Cream of Wheat Co. v. Grand Forks*, 254 U. S. 325 (1920), wherein it appeared that

the only activity of a North Dakota corporation was the maintenance of an office in said state. All of the activities provided for in its purpose clause were conducted wholly outside North Dakota and it had neither tangible or intangible property therein. All of its property was taxed by other states. The State of North Dakota sought to tax the corporation's personal property, including bonds and stocks. Mr. Justice Brandeis, speaking for the Court, held that the limitation of the Fourteenth Amendment upon the power of a state to tax the property of its residents, which has acquired a permanent situs outside the state, does not apply to intangible property, even though it has acquired a "business situs" and is taxable in another state. He concluded that the fact that a corporation's property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile, and that the Fourteenth Amendment does not prevent double taxation (Opinion of the Court, page 328).

2. STATE OF DOMICILE MAY TAX THE INTANGIBLE ASSETS OF A DOMESTIC CORPORATION, REGARDLESS OF SO-CALLED BUSINESS OR PHYSICAL SITUS

The Supreme Court of the United States has consistently reaffirmed the *Cream of Wheat* case, supra, and has confirmed the authority of a state which gives a corporation its existence to tax its intangible assets, regardless of their situs or status elsewhere.

The case of *Newark Fire Insurance Co. v. State Board of Tax Appeals et al.*, 307 U. S. 313 (1939), involved the question as to whether New Jersey could levy a property tax on a domestic corporation based on the full value of its capital stock and accumulated surplus. The fact that the corporation's activities were practically identical with those of the appellant in this case is illustrated by the statement of the Court at page 316, which concluded that all of the general affairs of the company were conducted at the main office in New York City and have been so conducted there since appellant moved its main office from Newark six years before.

The tax was resisted on the ground that the corporation's intangibles had acquired a business situs, and the corporation a tax domicile in New York. New Jersey conceded the existence of a business situs in New York. Mr. Justice Reed, at page 318, stated that the imposition of such a tax did not violate due process.

The opinion of Mr. Justice Reed, concurred in by the Chief Justice, Mr. Justice Butler and Mr. Justice Roberts, concluded that the facts fell short of establishing a business situs in New York. However, the concurring opinion of Mr. Justice Frankfurter, concurred in by Mr. Justice Black, Mr. Justice Stone and Mr. Justice Douglas, held that the existence of a business situs or tax situs in another state was immaterial and did not affect the right of the domiciliary state to impose a tax. He reiterated the proposition that the extent of a state's taxing power over a corporation of its own creation, as recognized in the *Cream of Wheat* case, has neither been restricted nor impaired, and concluded that the case had not been cited otherwise than with approval.

In *Curry v. McCanless*, 307 U. S. 357 (1939), Mr. Justice Stone, in discussing the authority of a state to tax the intangibles of its domiciliary, regardless of their physical situs, made the following statement at page 307:

> "* * * Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax. Carpenter v. Pennsylvania, 17 How. 456; Kirtland v. Hotchkiss, 100 U. S. 491; Hawley v. Malden, 232 U. S. 1; Bullen v. Wisconsin, 240 U. S. 625; Cream of Wheat Co. v. Grand Forks, 253 U. S. 325; Blodgett v. Silberman, 277 U. S. 1; Farmers Loan & Trust Co. v. Minnesota, supra; Baldwin v. Missouri, supra; Beidler v.

South Carolina, 282 U. S. 1; First National Bank v. Maine, supra; Virginia v. Imperial Coal Sales Co., 293 U. S. 15; Schuylkill Trust Co. v. Pennsylvania, 302 U. S. 506."

The same principle had previously been enunciated in *Blodgett v. Silberman*, 277 U. S. 1 (1928), wherein it was held that the state of a decedent's domicile may impose a succession tax on the transfer of his intangible property, even though the evidence of such property is outside of the state at the time of his death, and also subject to taxation in the other jurisdiction. The Court, Mr. Chief Justice Taft, in reaffirming the doctrine of mobilia sequuntur personam, stated at page 9:

"* * * it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the State of domicil or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

"Further, this principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds or promissory notes, is subject to taxation in another jurisdiction. * * *"

3. DOUBLE TAXATION AND THE DUE PROCESS CLAUSE

The doctrine of mobilia sequuntur personam is not weakened in any respect by the fact that the state of physical location of the intangible may also impose a tax thereon. Such fact does not establish double taxation.

Double taxation is only invalid if imposed by the same jurisdiction.

In *State Tax Commission of Utah v. Aldrich*, supra,[2] it was held that the State of Utah might impose a tax upon the transfer by death of shares of stock in a corporation which was incorporated under its laws, even though the decedent who owned the shares was domiciled in another state, the certificates representing the shares were held there, neither the certificates nor the owner were ever within the state of incorporation and the corporation conducted all its activities outside the domiciliary state. The tax was sustained on the basis of the corporation's domicile even though it was not imposed on the corporation itself or upon a Utah domiciliary. The Court stated, at page 179, that the rule of immunity against double taxation espoused by *First National Bank v. Maine*, 284 U. S. 312 (1932), had long been rejected in other cases, and that the reasons why the Fifth Amendment does not require the court to fix a single exclusive place of taxation of intangibles for the benefit of their foreign owner are

[2] 316 U. S. 174 (1942).

no less cogent when applied to the Fourteenth Amendment and overruled *First National Bank v. Maine*, supra.

Mr. Justice Frankfurter, concurring, made the following statement with respect to the right of a state to tax intangibles of corporations, regardless of where situated, stated at page 182:

> "This phase of the taxing power, rooted in the established practices of the States in common with other governments, was not suddenly abrogated on July 28, 1868, when the Fourteenth Amendment became the law of the land. *On the contrary, taxes based on the States' power over corporations of their own creation thereafter became an increasingly familiar source of revenue,* * * *"
>
> (Emphasis supplied)

See *Graves et al., Commissioners v. Elliott*, 307 U. S. 383 (1939).

In *Curry v. McCanless*, supra,[3] your Honorable Court, speaking through Mr. Justice Stone, disposed of the question of double taxation jurisdiction in the following language:

> "* * * *But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles.* Cream of Wheat Co. v. Grand Forks, supra, 329; see Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54."
>
> (Emphasis supplied)

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[3] 307 U. S. 357 (1939).

4. TAXATION BY STATE OF BUSINESS SITUS DOES NOT DETRACT FROM POWER OF DOMICILIARY STATE

As already pointed out, the fact that intangibles of a corporation domiciled in one state are taxed by a state where they have acquired a business or tax situs does not in any way impair the power of the domiciliary state to impose a tax thereon. See *Blackstone v. Miller*, supra; *Farmers Loan Company v. Minnesota*, supra; *State Tax Commission of Utah v. Aldrich*, supra; *Cream of Wheat Co. v. Grand Forks*, supra; *Newark Fire Insurance Co. v. State Board of Tax Appeals et al.*, supra; *Curry v. McCanless*, supra; *Blodgett v. Silberman*, supra; *Graves et al., Commissioners v. Elliott*, supra.

Even though it has been held that a business situs when established authorizes the imposition of a tax upon the intangibles owned by a foreign corporation, see *State Board of Assessors v. Comptoir National*, 191 U. S. 388 (1903); *Bristol v. Washington County*, 177 U. S. 133 (1900); *New Orleans v. Stempel*, 175 U. S. 309 (1899); *Metropolitan Life Insurance Co. v. New Orleans*, 205 U. S. 395 (1907); *Liverpool & London & Globe Insurance Co. v. Board of Assessors for the Parish of Orleans*, 221 U. S. 346 (1911), in no case was it even suggested that the state of domicile did not, likewise, have power to tax. The only objection that could be asserted against the exercise of such power is the claim that this would result in double taxation and violate due process as defined by

the Fourteenth Amendment. This argument has already been completely answered in this brief.

In addition to the cases already cited, appellee calls attention to *First Bank Stock Corp. v. Minnesota*, 301 U. S. 234 (1937), where a Delaware corporation, transacting its corporate and fiscal business in Minnesota, where it kept stock certificates of subsidiary corporations and received dividends thereon, declared and disbursed dividends on its own stock, and maintained within the state an integrated business of protecting its own investments, was held to be commercially domiciled in Minnesota, and that, consequently, its shares of stock in banking corporations were taxable in Minnesota.

Mr. Justice Stone, in reaching the above conclusion, was careful to point out, at page 237, that the corporation was to be regarded as legally domiciled in Delaware and as taxable there upon all its intangibles.

In *Wheeling Steel Corp. v. Fox, State Tax Commissioner*, 298 U. S. 193 (1936), it was again held that intangible property, such as accounts receivable and bank deposits, may have a situs for taxation by a state other than that of the owner's domicile. However, the Court, Mr. Chief Justice Hughes, again was careful to emphasize the proposition that the corporation's domiciliary state had the right to apply the rule mobilia sequuntur personam and treat all of the corporation's intangibles as localized therein for the purpose of taxation, regardless of their tax or business situs elsewhere.

5. APPELLANT'S INTANGIBLES HAVE ACQUIRED NO BUSINESS OR TAX SITUS OUTSIDE OF PENNSYLVANIA

Whether or not appellant's intangibles have acquired a business or tax situs outside of the domiciliary state, the tax jurisdiction of the domiciliary state is in no wise impaired. However, it is respectfully submitted that appellant has not presented any evidence in support of its position that its intangible assets have acquired such situs elsewhere. The burden of establishing such situs, if material, is upon appellant. It has in no way attempted to meet this burden.

The record discloses that none of the intangibles representing the value of the capital stock taxed by Pennsylvania is used in connection with appellant's business in Florida. There is no evidence that these assets are related to or necessary to appellant's business. Its original capitalization of One Hundred Thousand Dollars ($100,000.00) is represented by its intangible assets in foreign countries which produced the profits giving rise to these intangibles. Appellant is not a holding company nor an investment company. Its business could be conducted without the maintenance of a Florida office which is not essential or even necessary for the management or success of its business. There is no evidence that appellant has ever negotiated a contract in Florida, and the record discloses that it has never done any construction work in Florida. It employs no salesmen in Florida or

elsewhere. All of its tangible assets are located outside the continental limits of the United States. It performs its corporate function of doing construction work outside the continental limits of the United States (R. 7a, 8a, 9a).

Whether or not any of appellant's intangibles have acquired a business or tax situs in Florida does not depend upon whether the corporation actually does business within that State. To acquire such situs, said intangibles must have been produced by reason of activities occurring within Florida. But, the activities of appellant in Florida do not constitute the doing of business.

The opinion of the Attorney General of Florida, January 28, 1950, held that:

> "The mere fact that a foreign corporation is qualified to do business within Florida is not sufficient to create a business situs in the State authorizing the taxation of the intangibles of the corporation. For intangibles to acquire a business situs, apart from the domicile of the corporation, they must have become localized in some independent business or investment away from the corporation's domicile, so that its substantial use and value primarily attach to and become an asset of the outside business."

The corporation has not met this Florida test. Furthermore, the appellant has not alleged that it has qualified or registered to do business in Florida. Section 613.01 of the Florida Statutes Annotated, Vol. 10, Title XIII, Taxation and Finance, requires the registration of every foreign corporation to do busi-

ness in Florida. Section 613.02 requires the procurement of a permit and the payment of a tax in connection therewith. There is no evidence that such a permit has been obtained or such tax paid.

The fact that appellant has seen fit to pay a Florida franchise tax of approximately One Hundred Dollars ($100.00) on the One Hundred Thousand Dollars ($100,000.00) of its intangibles located in Florida is of no significance. It was not required to pay this tax since the Florida Statutes, supra, Section 199.07 provides with respect to the Florida tax on intangibles as follows:

> "* * * credit shall be allowed against such taxes for any amount of intangible or income taxes such taxpayer is required to pay to another state for all or any part of said year on said intangible personal property or the income therefrom. * * *"

Obviously, appellant saw fit to pay a tax for which it was not liable.

Appellant's position with respect to the situs of its intangibles in Florida is completely answered by the case of *Newark Fire Insurance Co. v. State Board of Tax Appeals et al.*,[4] supra, where it appeared that the company's executive offices of a New Jersey corporation were located in New York City. The general accounts of the company were kept in the office in New York City. The general accounting, underwriting and executive offices were all located there. All cash and securities of the company were located there or in banks in that city or in other banks outside the

[4] 307 U. S. 313 (1939).

State of New Jersey. All of the general affairs of the company were conducted at the main office in New York City and had been so conducted there for a period of six (6) years. In his concurring opinion, Mr. Justice Reed held that these factors did not constitute sufficient evidence justifying a conclusion that the intangibles of the corporation which were located in New York had acquired a business or tax situs in that state and concluded that the state of domicile always has power to tax intangibles of a domestic corporation, regardless where situated.

It is evident that Newark Fire Insurance Company performed activities in the State of New York far wider in scope and much more closely connected with its corporation purposes than the appellant conducted in Florida. Newark sold insurance in New York through its New York offices. The present appellant does nothing in Florida which produces the income out of which its intangibles were created. A fortiori it is clear that the intangibles of appellant have never acquired any type of situs outside of the domiciliary state, Pennsylvania.

Even assuming that appellant corporation is doing business in Florida, this fact does not establish a situs for its intangibles in that state. They were not produced or used in connection with any of appellant's activities in Florida. It could have performed all of its stipulated functions in Florida without any intangibles being located there, and thus, its intangible assets have no relation to any Florida business activity. The documentary evidence of their ownership was not kept in Florida because of the needs of the

business but merely because the corporation preferred to keep them there. The additional fact that the evidence of most of these intangibles was outside of Florida proves that they were not connected with or necessary to the Florida activity.

CONCLUSION

Throughout the history of our jurisprudence the law has supported the proposition that the state of a corporation's domicile has the power to impose a tax upon its intangible assets, regardless of the locality of the documents or books evidencing the existence thereof, and without regard to whether the corporation had acquired a business, commercial or tax situs elsewhere. To concede any merit to appellant's position would require an overruling of every United States Supreme Court case which considered this subject.

For the reasons stated above, it is respectfully submitted that the present appeal be dismissed, or that the final judgment of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

EDWARD FRIEDMAN,
Deputy Attorney General.

THOMAS D. MCBRIDE,
Attorney General.

Attorneys for the Commonwealth of Pennsylvania, Appellee.